LEE WAH BANK LTD. v. CHI LIUNG HOLDINGS SDN. BHD.

[O.C.J. (Siti Norma Yaakob J.) May 9, 1986]

[Kuala Lumpur – Originating Summons No. F.1871 of 1985]

Contract – Installation of ATM machine at premises – Whether proposed plans a deviation from approved plans of the building or just an alteration and improvement.

On November 17, 1980 the plaintiffs had purchased a parcel of business premises measuring 3,500 sq. feet on the ground floor and 1,500 sq. feet on the first floor of the defendants' building complex known as Chi Liung Plaza. The plaintiffs had, since the purchase, been using the premises for their business of banking. For the purpose of extending their facilities to their customers, they proposed to install an ATM at the premises. On June 18, 1985 they wrote to the defendants seeking the latter's consent to the proposed installation but the defendants withheld their consent on the ground that the matter of installing such a machine had already been adjudicated before. This is a direct reference to proceedings in O.S.F. 836/82 brought by the plaintiffs against the defendants, also for the purpose of installing an ATM at the same premises. As the plaintiffs consider that the previous proceedings have no bearing on their letter of request and that the defendants have been unreasonable in withholding their consent, they filed these present proceedings seeking a declaration that the refusal of the defendants to consent to the plaintiffs' request to install an ATM at their business premises is unreasonable and that the plaintiffs be allowed to install the machine in the manner described in their letter dated June 18, 1985. The defendants objected to the plaintiffs' application on the following two grounds:

(a) that the installation of the ATM in the manner described by the plaintiff would involve a deviation from the approved plans of the Plaza which can only be done at the time of construction and not after the whole building had been completed;

(b) *res judicata* applies so as to prevent the plaintiffs making the same application as they had done previously in O.S.F.836/82.

Held: (1) The proposed plan is nothing more than an alteration or an improvement as it involves substituting or replacing the original material with another. Moreover, the premises where the proposed installation is to be built no longer belong to the defendants and as owners of the premises, the plaintiffs have every right to install such a machine in the course of providing better and up-to-date facilities to their customers provided of course they obtain the necessary consent from both the local authorities and the defendants under section 14 of the sale and purchase agreement;

(2) *res judicata* does not arise as the facts now relied upon by the plaintiffs and the relief sought are very different from those raised in the previous proceedings.

Cases referred to:

(1) *Yat Tung Investment Co. Ltd.* v. *Dao Heng Bank Ltd. & Anor.* [1975] A.C. 581.

(2) *Loh Holdings Sdn. Bhd.* v. *Peglin Development Sdn. Bhd. & Anor.* [1984] 2 M.L.J. 105.

ORIGINATING SUMMONS.

P. Royan for the plaintiffs.

Rahim Nor (*G. T. Rajan* with him) for the defendants.

Cur. Adv. Vult.

Siti Norma Yaakob J.: The issue raised in these proceedings is whether the defendants had unreasonably withheld their consent to the plaintiffs installing an automated teller machine (ATM) at the plaintiffs' business premises situated in a shopping and office complex belonging to the defendants.

On November 17, 1980, the plaintiffs had purchased a parcel of business premises measuring 3,500 sq. feet on the ground floor and 1,500 sq. feet on the first floor of the defendants' building complex known as Chi Liung Plaza. The plaintiffs had, since the purchase, been using the premises for their businesss of banking and for the purpose of extending their facilities to their customers, they propose to install an ATM at the premises. On June 18, 1985, they wrote to the defendants seeking the latter's consent to the proposed installation but the defendants withheld their consent on the ground that the matter of installing such a machine had already been adjudicated before. This is a direct reference to proceedings in O.S.F. 836/82 brought by the plaintiffs against the defendants, also for the purpose of installing an ATM at the same premises. As the plaintiffs consider that the previous proceedings have no bearing to their letter of request and that the defendants have been unreasonable in withholding their consent, they filed these present proceedings seeking a declaration that the refusal of the defendants to consent to the plaintiffs' request to install an ATM at their business premises is unreasonable and that the plaintiffs be allowed to install the machine in the manner described in their letter dated June 18, 1985.

The defendants raised two objections to the plaintiffs' application.

1. That the installation of the ATM in the manner described by the plaintiff would involve a deviation from the approved plans of the Plaza which can only be done at the time of construction and not after the whole building had been completed.

2. *Res judicata* applies so as to prevent the plaintiffs making the same application as they had done previously in O.S.F. 836/82.

To install the ATM, the plaintiffs propose to remove two glass panels fronting the southern section of the Plaza, replacing the same with a brick wall which will be erected within the boundaries of their premises and emplacing the ATM in the brick wall. This is clearly shown in the plans and photographs that are exhibited as LWB 9–12 attached to the plaintiffs' affidavit dated February 25, 1986. The plaintiffs maintain that the manner of installation amounts to nothing more than altering and improving their premises which is allowed under section 5.14 of the sale and purchase agreement dated November 17, 1980, entered into between them, subject of course to consent being obtained from both the local authority and the defendants. They stress that such alteration and improvement do not amount to a deviation from the approved plans of the Plaza which under section 6.06 of the sale and purchase agreement can only be executed in the course of the construction of the Plaza and not after its completion. This was so confirmed by the Federal Court in its judgment dated June 16, 1984 delivered in O.S.F. 836/82.

The defendants contend that the removal of the two glass panels and the construction of the brick wall not only amount to altering and improving the premises, but also a deviation from the approved plans of the Plaza which cannot now be effected as the building had already been completed since February 22, 1985. Hence, the only issue before me on the defendants' first objection is whether the manner of the proposed installation amounts to an alteration or a deviation.

From the exhibited plans and photographs, all that will be done to the frontage of the plaintiffs' premises is the removal of two glass panels and substituting or replacing them with a brick wall which will be built well within the plaintiffs' premises. I consider this to be nothing more than an alteration or an improvement as it involves substituting or replacing the original material with another. This has become necessary in view of the plaintiffs' nature of business to provide facilities to their customers to withdraw money, particularly well after the normal banking hours. Even if the works amount to a deviation, I still consider that section 6.06 has no application as the Plaza has already been completed. Moreover, the premises where the proposed installation is to be built no longer belong to the defendants and as owners of the premises, the plaintiffs have every right to install such a machine in the course of providing better and up to date facilities to their customers provided of course they obtain the necessary consent from both the local authorities and the defendants under section 5.14 of the sale and purchase agreement.

On the issue of *res judicata,* the defendants invoke that defence in its wider sense that the plaintiffs should be shut out from raising in a subsequent action an issue which they could and should have raised in O.S.F.836/82. See the cases of *Yat Tung Investment Co. Ltd.* v. *Dao Heng Bank Ltd. & Anor.*[1] and *Loh Holdings Sdn. Bhd.* v. *Peglin Development Sdn. Bhd. & Anor.*[2]

In that earlier proceedings, the defendants had intended to install the ATM in the wall of their premises facing the corridor of the main entrance to the Plaza. For such an installation, a rectangular hole had to be made through the wall separating the plaintiffs' premises from the corridor which is the main common area of the Plaza. In consideration of their consent to such installation, the defendants had demanded that the plaintiffs pay them a yearly rental of $20,000 and a deposit of $5,000. Dissatisfied with this pre-condition, the plaintiffs had applied for a declaration that they be entitled to install the ATM without any approval and without payment of any rental to the defendants.

On the right of the plaintiffs to install the ATM in the first place, the Federal Court had held that installing the ATM in the manner proposed by the plaintiffs would go beyond the common boundary and since the defendants had retained ownership of the exterior wall, the plaintiffs required the consent of the defendants for the use of the wall. The Federal Court also held that on the issue before them, they were not concerned with the proviso to section 5.14 and as such, the question of whether the defendants had withheld their consent unreasonably by imposing an annual rental was not even raised or determined in the previous proceedings.

The facts relied by both parties, the issues raised and the reliefs sought in the earlier proceedings do not, I consider, give the plaintiffs an opportunity to raise the issue of whether the defendants had been unreasonable in withholding the consent of the installation of the ATM as the plaintiffs had not then sought the defendants' consent based on different facts as disclosed in the later proceedings before me. In the later proceedings, the plaintiffs seek to install an ATM by removing two glass panels and replacing

them with the brick wall which will be built well within the plaintiffs' premises and will not, in any way, encroach into the defendants' Plaza as would have happened had the proposal to build the ATM in the earlier proceedings being carried out. To that extent, I consider that *res judicata* does not arise as the facts now relied upon by the plaintiffs and the relief sought are very different from those raised in the previous proceedings.

The defendants have also pleaded that once installed, the use of the ATM along the narrow corridor which is in common use by the other occupiers of the Plaza would hinder and obstruct the corridor and since this would adversly effect their rights under the sale agreement, they had the right to impose conditions under section 5.11 to safeguard their own interests. This may well be so but this right does not extend to withholding their consent to the installation of the ATM in the first place. This is even so as the area on which the ATM will be installed will in no way jut out into the defendants' area and however narrow the corridor may be, the fact still remains that the plaintiffs have an absolute right over it as it is within the sphere of their ownership. Strangely enough, this objection was never raised in the earlier proceedings and I doubt whether the payment of a yearly levy of $20,000 as rental would have lessened the annoyance or hindrance that would occur to the other users of the corridor.

For the very reason that the ATM is to be installed within their own premises and will not encroach into any part of the Plaza, I consider that the defendants have been most unreasonable in withholding their consent especially so when they are fully aware that as bankers, the plaintiffs require the ATM to provide the latest and a most necessary facility to their customers. On that finding, I had accordingly made a declaratory order in terms of the plaintiffs' prayers at (a), (b) and (d) of this originating summons.

Order accordingly.

Solicitors: *Shook Lin & Bok; G.T. Rajan & Co.*

RE C. ROSS-MUNRO Q.C.

[O.C.J. (Zakaria Yatim J.) April 7, 1986]

[Kuala Lumpur – Originating Motion No. C32-9-86]

Legal Profession – Queen's Counsel – Application for admission as advocate and solicitor of High Court, Malaya to appear for defendant in Supreme Court and High Court civil suits – Special qualifications or experience of applicant of a nature not available amongst advocates and solicitors in Malaysia – Whether applicant should be admitted – Legal Profession Act 1976, s. 18(1).

In this application, Colin Ross-Munro, a Queen's Counsel of wide experience in both civil and criminal cases, applied for admission as an advocate and solicitor of the High Court, Malaya, under section 18(1) of the Legal Profession Act 1976, to enable him to appear before the Supreme Court on behalf of one Lorrain Esme Osman as well as to appear in two civil suits Nos. 138 and 438 of 1985. The Bar Council, the Selangor and the Federal Territory Bar Committee did not object to the application which the Attorney-General opposed on the main ground that there were lawyers in the country who had special qualifications and experience to represent Lorrain Osman at those hearings. The question for consideration is whether the applicant possesses "special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia".

Held, allowing the application: (1) the issues that will be dealt with in the two civil suits are complex and important issues which require the services of a person with special qualifications and experience;

(2) the fact that a Queen's Counsel was admitted to appear before the Supreme Court earlier in respect of similar matter shows that the matter requires the services of a person with special qualifications and experience of a nature not available in Malaysia.

Case referred to:

(1) *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] A.C. 396.

ORIGINATING MOTION.

J. Fernandez for the applicant.

Mohamed Rauf Nabi Box (Senior Federal Counsel) for the Attorney-General.

Ng Seng Geok for the Malaysian Bar Council, Selangor and Federal Territory Bar Committee.

L. H. Ng for the plaintiffs in the civil suits.

Zakaria Yatim J. (delivering oral judgment): This is an application by notice of motion for the admission of a Queen's Counsel, Mr. Colin Ross-Munro, as an advocate and solicitor of the High Court, Malaya under section 18(1) of the Legal Profession Act 1976. The application was made to enable him to appear before the Supreme Court on behalf of Lorrain Esme Osman as well as to appear in two civil suits No. 138 and 438 of 1985.